No. 455.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

HENRY J. RIPPERGER, as RECEIVER of UNITED STATES ELECTRIC POWER CORPORATION,
Petitioner,

vs.

A. C. ALLYN & CO., INC., and FIRST BOSTON CORPORATION,
Respondents,

and

SCHRODER-ROCKEFELLER CO. INC.,
Defendant.

BRIEF OF RESPONDENT A. C. ALLYN AND COMPANY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CLAIRE W. HARDY,
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A. C. Allyn and Company, Inc.

MC CORNICK AND HENDERSON, INC., CHICAGO

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OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 113 Fed. (2d) 332, and appears in the Record at page 35. The opinion of the United States District Court for the Southern District of New York was not reported, but appears in the Record at page 28.

I.

STATEMENT OF THE CASE.

United States Electric Power Corporation is a Maryland corporation (R. 1). Petitioner has inadvertently stated that respondent A. C. Allyn and Company, Inc., is a Maryland corporation. As a matter of fact, it is a Delaware corporation (R. 2), and long before the institution by petitioner of his former action against respondent, it had been authorized to do business in New York and had designated the Secretary of State of New York as its agent upon whom process might be served (R. 2).

Petitioner neglects to state that in the suit he brought against respondent in the District of Delaware, upon the same causes of action as in his preceding suit in the Southern District of New York, he likewise joined therein another party defendant, which suit is at issue and pending trial (R. 3).

Subsequent to commencement of the suit in the Delaware District and following the decision of this Court in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, petitioner again sued respondent in the Southern District of New York upon the same causes of action set forth in the former suit in that Court, although he had abided the decision dismissing the complaint as to respondent in the former suit in that same district (R. 3).

For convenience the three suits instituted by the petitioner against respondent upon identical causes of action will be referred to as the "first New York suit", the "Delaware suit", and the "second New York suit".

The basis for Federal jurisdiction of the causes of action between the parties thereto was alleged to be diversity of citizenship between plaintiff and defendants (R. 2, Fol. 6).

QUESTION PRESENTED.

Respondent considers the question, for which review is sought, to be somewhat broader than as stated in the Petition for Certiorari; namely, it is whether the petitioner, having abided the decision of the United States District Court for the Southern District of New York dismissing the complaint and quashing service of the subpoena in his first New York suit for lack of jursidiction, as against this respondent, upon the ground of improper venue, is barred by that decision from again suing respondent in the same Court upon the same causes of action.

II.

SUMMARY OF ARGUMENT.

1. No conflict lies between the decision of the Circuit Court of Appeals for the Second Circuit in the instant case and any other Circuit. The only Federal Court decision rendered to the contrary was given in 1891 and has been repeatedly overruled by subsequent decisions of this Court.

2. The decision of the Circuit Court of Appeals for the Second Circuit is in strict conformity with the decisions of the Supreme Court and with the principle of *res judicata*.

ARGUMENT.

1. No conflict lies between the decision of the Circuit Court of Appeals for the Second Circuit in the instant case and any other circuit. The only federal court decision rendered to the contrary was given in 1891 and has been repeatedly overruled by subsequent decisions of this Court.

Petitioner relies upon the single case of *Rand* v. *United States*, 48 Fed. 357 in support of the claim that the decision of the instant case is in conflict with the decision of the Circuit Court of Appeals for the First Circuit. The *Rand* case was decided by a United States District Court, November 28, 1891. In that suit, the plaintiff sought recovery on a claim for fees for services as Commissioner of the Circuit Court which had been rejected by the Comptroller of the Treasury. The amount involved was $247.10, and was based upon many items falling into various classes of service. One class involved the sum of $17.00 which had been disallowed by the same Court in a former suit between the same plaintiff and defendant, 36 Fed. 671, upon the ground of lack of jurisdiction of the claim in

conformity with the interpretation in *Bliss* v. *United States,* 34 Fed. 781, of a then existing statute. The District Judge, in his opinion in the earlier *Rand* case, stated that the ~~lien~~ claim was rejected in order to conform with the opinion of the Circuit Court of the same Circuit rendered in the *Bliss* case. The plaintiff included the said item of $17.00 in his second suit. Subsequent to the decision in 36 Fed. 671, and prior to the decision rendered in 48 Fed. 357, the interpretation of the statute given in the *Bliss* case was reversed. In an opinion in the later case, dealing separately with each class of claim, and allowing the entire amount demanded, the District Judge stated (p. 358) he allowed the item upon the ground that its dismissal in the previous suit for want of jurisdiction, having been based upon an interpretation of the statute which was subsequently reversed, did not act as a bar to the claim. Upon appeal, the decision of the Court below was affirmed by the Circuit Court of Appeals without opinion (53 Fed. 348).

Whether or not review of the decision in the *Rand* case on the specific question of *res judicata* was sought in the Circuit Court of Appeals we are unable to state, but the ruling was made at a time when this Court had not passed upon the point involved, and all pertinent decisions of this Court have been to the contrary.

Stoll v. *Gottlieb,* 305 U. S. 165, 172;

Chicot County Drainage District v. *Baxter State Bank,* 308 U. S. 371, 374, 376, 377;

Baldwin v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522, 524, 525, 526;

Sunshine Anthracite Coal Co. v. *Adkins,* 310 U. S. ....., 60 Sup. Ct. Rep. 907, 917;

American Surety Co. v. *Baldwin,* 287 U. S. 156, 166;

United States v. *Moser,* 266 U. S. 236, 242.

In *Stoll* v. *Gottlieb,* 305 U. S. 165, at page 172 this Court said:

> "After a Federal court has decided the question of jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact."

In *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, at page 376, this Court stated:

> "The lower Federal courts are all courts of limited jurisdiction * * *. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine *whether or not* they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. *Their determination of such questions while open to direct review, may not be assailed collaterally.*" (Italics ours.)

The fact that the first New York suit was dismissed under an interpretation of Section 51 of the Judicial Code which was later determined by this Court in the *Neirbo* case to be erroneous, is immaterial to the point in issue.

> " * * * a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or an erroneous application of the law."
>
> *United States* v. *Moser,* 266 U. S. 236, 242.

2. The decision of the Circuit Court of Appeals for the Second Circuit is in strict conformity with the decisions of the Supreme Court and with the principle of res judicata.

The principle of *res judicata* has been long established and its application to jurisdictional decisions as a bar to

a second suit between the same parties or their privies in the same court upon the same cause of action is wholly consistent with that principle.

In *American Surety Co.* v. *Baldwin,* 287 U. S. 156, at 166, decided in 1932, this Court said:

> "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues." (Citing *Baldwin* v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522) "They are given effect even where the proceeding in the Federal court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the state courts. * * * The principles may apply, although the proceeding was begun by motion."

In *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, at 377, decided in 1940, this Court said:

> *"The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action."* (Italics ours.)

To similar effect are *Stoll* v. *Gottlieb,* 305 U. S. 165, 172; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. ....., 60 Sup. Ct. Rep. 907, 917.

Examination of the cases holding jurisdictional decisions entered in prior suits between the same parties upon the same causes of action *not* to be *res judicata* discloses that (with the single exception of *Rand* v. *U. S., supra*) all were cases in which jurisdiction in the first suit had been denied either because of some defect of pleading, as a failure to allege proper jurisdictional grounds, or because the first suit had been laid in the wrong jurisdiction, and that in the subsequent suits the error of pleading was corrected

or the suit was laid in the proper jurisdiction. In other words, in each instance a different state of facts existed between the first and the second suits. It is, therefore, apparent that because of the change in the factual situation the principle of *res judicata* could not be applied as a bar to the subsequent suit. Such decisions are not in conflict with the decisions in the instant case.

It is to be noted that the opinion in the *Chicot* case at page 376 specifically states that a determination by the courts "*whether or not* they have jurisdiction" (Italics ours) is *res judicata.* This effectually disposes of petitioner's contention that decisions sustaining jurisdiction are *res judicata* but that decisions denying jurisdiction are not. As the Circuit Court of Appeals well said: "We think the argument ingenious but unsound." (R. 37)

Certainly there can be no element of equity in what is in effect the claim of petitioner, that having foregone his right of appeal from the decision in the first New York suit, and having put respondent to the inconvenience and expense of appearing and defending suit upon the same causes of action in the Delaware District Court, he may, without change in the factual situation between the parties, continue to harrass respondent by a second suit in the Southern District of New York upon the same causes of action. As was stated by this Court in *Stoll* v. *Gottlieb,* 305 U. S. 165, at page 172:

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation."

Petitioner makes much of the claim that to permit the instant suit to be maintained in the District Court for the Southern District of New York against respondent will

enable him to join this action with the first New York suit and thereby avoid unnecessary litigation. This claim is made despite the fact that already a large amount of testimony and many exhibits have been introduced in evidence in pre-trial examination in that case, to which respondent is not a party, and despite the further fact that in the Delaware suit there is another defendant (R. 3), so that there would be no reduction in the number of suits in litigation.

III.

CONCLUSION.

The decision of the District Court and of the Circuit Court of Appeals in the instant case was proper and in accordance with prior decisions upon the same subject. That petitioner has failed to show any reason for the granting of a writ of certiorari herein. No novel question is presented, nor is there any ambiguity or uncertainty in the law which requires clarification. There has been no departure from the established rules of practice or of law, and the petition for writ of certiorari should be denied.

Respectfully submitted,

CLAIRE W. HARDY,
Counsel for Respondent,
A. C. Allyn and Company, Inc.

October, 1940.

Supreme Court of the United States

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Defendant.

BRIEF OF RESPONDENT FIRST BOSTON CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN C. BRUTON, JR.,
Counsel for Respondent
First Boston Corporation.

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BRIEF OF RESPONDENT FIRST BOSTON CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

The orders of the District Court (R. 5-10) and the decree affirming those orders (R. 38) which the petitioner seeks to have this Court review, hold that prior orders (R. 23, 24) of the United States District Court for the Southern District of New York dismissing an *identical* action against the respondents on the ground that the action was brought in the wrong district, are *res judicata* on the question of jurisdiction in the present action.

The petitioner is the Receiver of a Maryland corporation and is himself a resident of the State of Maryland.

The respondent, First Boston Corporation, is a Massachusetts corporation and is and has been since shortly after its incorporation qualified to do business in the State of New York. When the prior action was commenced against the respondents by the petitioner, the respondents moved to set aside the attempted service of the summons and complaint and to dismiss the complaint on the ground that the Southern District of New York was not the proper district in which the action should be brought. Those motions were granted and orders were entered setting aside the attempted service of the summons and complaint and dismissing the complaint.

The petitioner then instituted actions against the respondents and other defendants in the United States District Courts in Massachusetts and Delaware. Thereafter, this Court, in the case of *Neirbo Co.* v. *Bethlehem Shipbuilding Corp., Ltd.*, 308 U. S. 165, held that where a foreign corporation qualifies to do business in the State of New York, thereby designating an agent for the receipt of process, it waived its right to object to being sued in the Federal District Courts of New York.

Although he had not appealed from the prior order dismissing the complaint as against the respondents, and although the respondents *at the time the prior action was brought and dismissed* were qualified to do business in the State of New York, and had designated an agent for the receipt of process, a salient fact (R. 2) ignored by petitioner in his statement, the petitioner, after the decision of this Court in the *Neirbo* case, instituted the present action, again raising the identical question which had previously been determined. The District Court dismissed the complaint and set aside the attempted service of the sum-

mons and complaint on the ground that the prior order was *res judicata* on the question of jurisdiction and thus a conclusive determination of the issue raised. The Circuit Court of Appeals unanimously affirmed the order of the District Court.*

Opinion Below, Jurisdiction and Statute Involved

The citation of the opinion below, the jurisdiction of the Court, and the statute involved are set forth in the petition for writ of certiorari herein (p. 2).

Argument

POINT I

The question presented is a narrow one of no public interest, and the decision of the Circuit Court of Appeals clearly follows prior decisions of this Court.

The petition states that the decision of the Circuit Court of Appeals is not in harmony with the applicable rule as laid down by this Court and is in conflict with a decision of the Circuit Court of Appeals for the First Circuit (Petition, p. 5). These assertions by petitioner are plainly an attempt to state grounds which might justify this petition, where none in fact exist.

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*Subsequently, and prior to the petition herein, the petitioner served an amended complaint in this action against the defendant Schroder-Rockefeller & Co., Inc., in which the respondents are not named as defendants. It would thus appear that the respondents have been dropped from the action, with the result that the question presented on this petition has become moot.

This Court has held in no less than seven recent decisions that a judicial determination of the issue of jurisdiction in a cause is conclusive on that question, and invulnerable to collateral attack:

United States v. *Moser,* 266 U. S. 236;
Baldwin v. *Iowa State Traveling Men's Assn.,* 283 U. S. 522;
American Surety Company v. *Baldwin,* 287 U. S. 156;
Stoll v. *Gottlieb,* 305 U. S. 165;
Treinies v. *Sunshine Min. Co.,* 308 U. S. 66;
Chicot County Dist. v. *Baxter State Bank,* 308 U. S. 371;
Sunshine Anthracite Coal Co. v. *Adkins,* 310 U. S. —— (decided May 20, 1940).

The petitioner attempts to distinguish these decisions by contending that, while a determination on the issue of jurisdiction is conclusive where jurisdiction is sustained, a decision that jurisdiction is lacking in an action leaves the parties as though no action had been brought. Thus, according to the argument, an adverse decision on jurisdiction has no effect whatsoever upon the plaintiff's right to bring the same action all over again in the same court, any number of times, even though there has been no change in the facts upon which jurisdiction depends. The applicability of the principle of *res judicata* would thus be made to depend upon *which way* the question was decided—not upon *whether* the question was decided. As the Circuit Court stated in its opinion, the petitioner has presented no reason "why the rule should be less applicable to a decision denying jurisdiction than to one sustaining it".

Moreover, the opinions of this Court make it clear that the rule is as applicable one way as the other.

In *Stoll* v. *Gottlieb, supra,* this Court stated:

> "Where adversary parties appear, a court must have the power to determine *whether or not* it has jurisdiction of the person of a litigant, * * *." (Italics supplied.)

and in *Chicot County Dist.* v. *Baxter State Bank, supra,* the Court repeated:

> "The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine *whether or not* they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of *such* questions, while open to direct review, may not be assailed collaterally." (Italics supplied.)

The decision of the Circuit Court of Appeals is manifestly in harmony with and follows the foregoing decisions by this Court.

All of the decisions cited by the petitioner as supporting his contentions, with the possible exception of the case of *United States* v. *Rand,* 53 Fed. 348, are wholly unrelated to the present question. Either the decision on the question of jurisdiction in the first action was pleaded as a bar in a subsequent action in a different forum as *res judicata* on the merits (obviously improper) as in *Hughes* v. *United States,* 71 U. S. 232, or there had been an omission, in the prior action, to allege essential and material

jurisdictional facts, as in *Smith* v. *McNeal,* 109 U. S. 426. These cases have no bearing on the present question, as the Circuit Court of Appeals correctly pointed out (R. 37).

The petitioner states that the case of *United States* v. *Rand, supra,* presents a conflict between the decisions of the Circuit Court of Appeals for the First Circuit in that case and the court below in the case at bar. The *Rand* case* was decided in 1892. The decision contains no discussion of the point here involved, and of course was decided many years prior to the decisions of this Court which were followed by the Circuit Court of Appeals in making the decree which the petitioner seeks to have the Court review.

POINT II

The decision of the Circuit Court was necessary to put an end to litigation and is in strict conformity with the purpose of the principle of *res judicata.*

The petitioner fails to state to the Court that in the actions instituted in the United States District Court for the District of Massachusetts against the respondent, First Boston Corporation, and in the United States District Court for the District of Delaware against the respondent, A. C. Allyn & Co., Inc., after the first order of the District Court dismissing the complaint as against the respondents, *other defendants, not parties to the New York action, are joined* (R. 3). After the institution of those

*The amount involved on this point was a claim for $17 against the United States.

actions respondents necessarily engaged counsel and prepared for the trial of the actions in the Massachusetts and Delaware District Courts. Those actions have been at issue for some time and in at least one of them (the Massachusetts action) pre-trial hearings have commenced. The present action in New York is the third action commenced by the petitioner against these respondents. The effect of the attempt to maintain this action is not simply double vexation, but in substance triple vexation for the same cause. Petitioner's statement that the effect of the holding of the Circuit Court is "to compel the petitioner to pursue his remedy in three different forums instead of trying the whole case in the United States District Court for the Southern District of New York" gives rise to an entirely false inference. Since other defendants are parties to the Massachusetts and Delaware actions, those actions will necessarily continue, even though the respondents are also joined in the New York action. The effect of a holding contrary to that of the Circuit Court would not be to put an end to litigation, but rather would be to subject the respondents to identical actions in two different District Courts.

POINT III

Conclusion.

The decision of the Circuit Court below follows and applies the established rules laid down by this Court. The decision moreover presents a clear case where the purpose of the principle of *res judicata,* namely, to put an end to

litigation, could lead to no result other than that reached by the court below.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied, with costs.

Respectfully submitted,

JOHN C. BRUTON, JR.,
Counsel for Respondent
First Boston Corporation.

October, 1940.